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In The

Supreme Court of the United States

October Term, 1991

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING,
Defendant,

UPON EXCEPTIONS TO THE FIRST AND SECOND INTERIM REPORTS OF THE SPECIAL MASTER

WYOMING MOTION FOR LEAVE TO FILE A REPLY BRIEF AND WYOMING BRIEF IN REPLY TO BRIEF FOR THE UNITED STATES OPPOSING EXCEPTIONS

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WYOMING MOTION FOR LEAVE TO FILE A REPLY BRIEF

The State of Wyoming requests leave of the Court to file the accompanying brief replying to the Brief for the United States Opposing Exceptions. The grounds for this motion are:

The United States filed no exceptions to the Special Master's reports and therefore filed no opening brief. The United States first set forth its positions on the matters covered in the Special Master's reports in the Brief for the United States Opposing Exceptions. Consequently, Wyoming has not had an opportunity to reply to the United States's arguments.

Wyoming's reply brief is tendered for filing within the time limits provided by SUP.CT.R. 25.3.

Wyoming's reply brief corrects misstatements of fact in the United States' brief and provides a more complete statement of the facts regarding the United States' involvement in this case. Wyoming respectfully submits that an application of those additional facts to the United States' arguments on the merits of Wyoming's exceptions will show why those arguments provide no basis for overruling Wyoming's exceptions.

Respectfully submitted,

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INTRODUCTION AND STATEMENT OF FACTS

The purpose of this reply brief is to correct misstatements of fact in the Brief for the United States Opposing Exceptions[1] and to apprise the Court of significant facts omitted by the United States concerning the United States' involvement and interest in this dispute. The United States' extensive involvement in the matters that are in dispute demonstrates that it is not so disinterested and objective as it would have the Court believe.

The Original Proceeding

The Court's first decision concerning the United States in the original proceeding[2] was the denial of Wyoming's motion to dismiss the Nebraska complaint for failure to join the United States. The Court held that the United States was a Wyoming appropriator and that Wyoming would represent the government's interest as *parens patriae*. *Nebraska v. Wyoming*, 295 U.S. 40 (1935). The United States later was granted leave to file a petition in intervention which claimed federal ownership of all the unappropriated water in the North Platte River. *Nebraska v. Wyoming*, 304 U.S. 545 (1938). The Court rejected the United States' theory of ownership of the unappropriated water on the ground that the United States was a Wyoming appropriator and was bound by section 8 of the Reclamation Act of 1902 to acquire water rights pursuant to state law. *Nebraska v. Wyoming*, 325 U.S. 589, 611-16, 629 (1945); 43 U.S.C. § 383 (1990). *See*

1. The Brief for the United States Opposing Exceptions is referred to herein as "U.S. Brief". Wyoming's Brief in Support of Exceptions to the First and Second Interim Reports of the Special Master is referred to as "Wyo. Brief on Exceptions".
2. *Nebraska v. Wyoming*, 325 U.S. 589 (1945).

also California v. United States, 438 U.S. 645 (1978). The documentary record discussed in Wyoming's briefs before the Special Master shows that one of the primary reasons that the United States pursued its theory of ownership of the unappropriated water was its recognition that it had not obtained a water storage priority for the Inland Lakes under Wyoming law. Wyoming Brief on Exceptions at 52 n.21; Wyoming Brief in Response to Motions for Summary Judgment of Nebraska and the United States at 47-87 (Docket No. 334) and citations to the record.

Inland Lakes

The United States mischaracterizes the 1953 stipulation modifying the Decree as well as the significance of the 1952 Glendo Unit Definite Plan Report ("DPR"). The United States is wrong when it claims that the reference to the DPR in Paragraph XVII of the Decree ratified an historical operation of the Inland Lakes including temporary storage of Inland Lakes water in Guernsey and Glendo Reservoirs. U.S. Brief at 22-23 n.12. The sole reference to the DPR in Paragraph XVII of the Decree related to storage of natural flow in Glendo Reservoir for the initial filling of a dead storage pool to maintain a power head "with water that is surplus to the requirements of the North Platte River at or above the Tri-State Dam." That reference had nothing to do with any plan or proposal to store Inland Lakes water in Glendo Reservoir.

Glendo Reservoir is located on the main stem of the North Platte River between Pathfinder Reservoir, which is the major storage facility for the North Platte Project, and the downstream North Platte Project canals. Storage water released from Pathfinder Reservoir for power

generation during the winter is restored in Glendo Reservoir for later delivery to the North Platte Project canals during the irrigation season. DPR at 3; Decree, ¶ XVII(b). Like the DPR, Paragraph XVII(b) of the Decree is very specific in describing the allowable uses of Glendo Reservoir. The only reference to temporary storage in Glendo for other ownerships is the reference to restorage of water "originally stored in Pathfinder Reservoir." The United States offers no explanation for its assertion that what was admittedly an annual agreement among the states and the United States to temporarily store Inland Lakes water in Glendo for administrative convenience has now ripened into an enforceable interstate water right under the Decree.

The government's discussion of the DPR also omits the fact that the DPR's list of water right priorities for the reservoirs on the North Platte, including smaller, off-channel reservoirs,[3] excluded the Inland Lakes. DPR at 124-25, Table 15, Third Affidavit of David G. Wilde, U.S. Motion for Summary Judgment (Docket No. 297). Further, the government's argument that water supply studies conducted for the DPR assumed continued non-irrigation season deliveries to the Inland Lakes is unconvincing when it is pointed out that some of those very studies assumed no deliveries or modified deliveries to the Inland Lakes. See Wyoming Brief in Response to Motions for Summary Judgment of Nebraska and the United States at 70-72 and Appendix C-193 to C-212 (Docket No. 334).

3. The Sutherland and Sutherland Regulator reservoirs are not located on the main stem of the North Platte but, like the Inland Lakes, are filled by diversions through a canal diverting from the North Platte.

Any suggestion that there has been a consistent historical practice with respect to operation of the Inland Lakes is unsupported by the record. In fact, the 46,000 acre-feet used by Special Master Doherty was an adjusted average volume of non-irrigation season diversions by the Interstate Canal during 1928-1939 that excluded 1934, 1935 and 1939 diversions of 17,000, 0, and 15,900 acre-feet respectively. Doherty Report at 60. Since 1945, the annual non-irrigation season diversions by the Interstate Canal have fluctuated widely from 16,000 acre-feet to nearly 84,000 acre-feet. Affidavit of Bern S. Hinckley, Table 1, Page 1, Wyoming Second Motion for Summary Judgment (Docket No. 294).

Deer Creek Reservoir

The United States Army Corps of Engineers granted a permit pursuant to section 404 of the Clean Water Act, 33 U.S.C. § 1344 (1990), for the construction of Deer Creek Reservoir.[4] The Corps conducted an extensive, three-and-a-half year study of the impacts of Deer Creek Reservoir on other uses of water in Wyoming and Nebraska for compliance with the National Environmental Policy Act, 42 U.S.C. §§ 4321-4370 (1990), and the Endangered Species Act, 16 U.S.C. §§ 1531-1543 (1990), and in fulfillment of the Corps' public interest review under section 404 of the Clean Water Act. The Corps concluded that, even under a "worst case" scenario with Deer Creek Reservoir operating with a priority senior to the Inland Lakes, there would be no significant impact on the North Platte Project, the Inland Lakes, or the irri-

4. Deer Creek Reservoir is proposed to be constructed with Wyoming state and local funding only. There is no federal financial involvement.

gation supplies that make up Nebraska's natural flow apportionment. Final Environmental Impact Statement for Regulatory Permits, Deer Creek Dam and Reservoir ("FEIS") at 4-21, Record of Decision at 11-12, 16-17, Supplemental Information Document at 16, 23 (Docket No. 84a). In addition, the Corps determined that Deer Creek Reservoir is the least damaging, practical alternative to provide a flexible, long-term municipal water supply to the City of Casper, Wyoming. Record of Decision at 17 (Docket No. 84a).[5]

Nebraska has challenged the Corps' issuance of the section 404 permit for Deer Creek Reservoir in the federal district court. *Jess v. West,* Civ. No. 88-L-308 (D. Neb., Complaint filed August 1, 1988, Order Staying Proceedings December 19, 1989). The amended complaint in *Jess v. West* alleges that, in issuing the section 404 permit, the Corps "failed to balance the benefits of the project against its reasonably foreseeable detriments," that issuance of the permit was "contrary to the public interest," and that there were "practical alternatives available which would have less of an adverse impact than the Deer Creek Project." First Amended Complaint for Declaratory and Injunctive Relief, ¶¶ 109, 111 and 112, *id.* The United States specifically denies each of those allegations and affirmatively alleges that the "federal defendants lawfully fulfilled their statutory obligations in complying with the Endangered Species Act, the National Environmental Policy Act, the Clean Water Act, the Administrative Procedures Act, and the regulations promulgated

5. The United States Department of Interior, Bureau of Land Management, and the United States Fish and Wildlife Service were cooperating agencies in the preparation of the FEIS. The United States Bureau of Reclamation also participated in and commented on the studies conducted by the Corps. FEIS at 6-2, 6-3, F-1 to F-19 (Docket No. 84a).

under each." Answer to First Amended Complaint for Declaratory and Injunctive Relief at 19, Defenses ¶ 2, *id.*

The Laramie River

The United States' witnesses in the original proceeding testified that the usable contribution of the Laramie River during the irrigation season was too small to be of any importance. Testimony of Andrew Weiss, Record at 20911-20912; Testimony of Harold Conkling, Record at 21549, excerpts reproduced in Appendix C to Wyoming Brief in Support of Second Motion for Summary Judgment (Docket No. 294).

The United States unsuccessfully asserted a claim to ownership of the waters of the Laramie River in *Wyoming v. Colorado,* 259 U.S. 419 (1922). The United States did not appear or assert any claim in the subsequent Laramie River litigation and never raised any objection to the plain statements of the Court that Wyoming is entitled to all the Laramie River flows remaining after Colorado's allowed use. *Wyoming v. Colorado, 298 U.S. 573, 578 (1936); id.,* 353 U.S. 953 (1957).

The United States has been involved with Grayrocks Reservoir since it was initially conceived as a potential Bureau of Reclamation reservoir. U.S. Response to Wyoming's Fifth Set of Interrogatories, Nos. 21-23 (Docket No. 290b). Since the early planning stages of Basin Electric Power Cooperative's ("Basin") Grayrocks Reservoir, the Army Corps of Engineers was involved in federal permitting and the Rural Electrification Administration (REA) was involved in federal loan guarantees for the project. When Nebraska sued the United States

over Grayrocks, the United States defended the project and became a party to the settlement agreement that ended the suit.

ARGUMENT

I. THE PARTIES SHOULD NOT BE COMPELLED TO LITIGATE MATTERS BEYOND THE SCOPE OF THE PLEADINGS REFERRED BY THE COURT TO THE SPECIAL MASTER.

Wyoming does not dispute that the purpose of the Decree was to carry out the Court's 1945 decision and that the Special Master might recommend injunctive relief to give effect to the apportionment determined in the original proceeding. *See* U.S. Brief at 13. For example, Wyoming's counterclaim requests the Court to enjoin wasteful practices in Nebraska to give effect to the Court's decision that equity "does not permit Nebraska to demand direct flow water from above Whalen for use below Tri-State." *Nebraska v. Wyoming,* 325 U.S. at 628 (1945). But the United States goes too far when it says that the Special Master may force the parties to litigate matters beyond the enforcement claims in Nebraska's petition so that he can determine in the first instance whether to recommend that the Court expand the reference to include such matters. U.S. Brief at 14.

United States v. Louisiana, 485 U.S. 88 (1988), does not support the government's position that the Special Master may require the parties to litigate matters beyond those referred to him by the Court. *Louisiana* was a boundary case in which the parties submitted proposed

decrees to carry out the Court's 1985 decision determining the interstate boundary in the vicinity of Mississippi Sound. The United States, Mississippi and the Special Master had recommended that the Court also determine portions of Mississippi's seaward boundary south of Mississippi Sound despite the Special Master's acknowledgment that such a matter would be beyond the scope of the reference to the Special Master. 485 U.S. at 90. The Court declined to determine the Mississippi boundary beyond the area covered in the original pleadings.[6]

Wyoming, as the defendant in this case, has a right to have Nebraska's allegations of Decree violations decided. She also has a right not to be forced into a lengthy and expensive trial on matters over which the Court has not exercised its original jurisdiction. Similarly, Wyoming has a right to expect that the unambiguous injunctions and other provisions of the Decree mark the limits of Wyoming's interstate obligations on the North Platte River, especially when those provisions of the Decree are amply supported by the Court's opinion and the underlying record.[7]

6. In *Louisiana*, the parties agreed that the dispute over the boundary south of Mississippi Sound was appropriate for resolution. Therefore, the Court simultaneously granted leave to the parties to file a complaint putting that dispute before the Court. 485 U.S. at 93.
7. The United States mischaracterizes *Wyoming v. Colorado*, 286 U.S. 494 (1932), by citing it as authority for the Special Master to resort to an underlying record to add content to the Court's previous opinion and Decree. U.S. Brief at 13, 20. There Colorado argued that an isolated provision of the decree was all that enjoined Colorado's behavior with respect to Laramie River diversions. The Court found Colorado's contention to be inconsistent with the rest of the decree as well as the underlying record.

II. IT IS NOT PREMATURE TO DEFINE AS A MATTER OF LAW THE EXTENT OF NEBRASKA'S DECREED APPORTIONMENT.

The United States begs the question of the extent of the decreed apportionment that Nebraska seeks to enforce in this case. Without explanation, the United States says it is "premature" to define the extent of Nebraska's existing apportionment. U.S. Brief at 37.

To accept the government's view of this case would be to realize the dissenting justices' fear that the Court will "become a continuing umpire or a standing Master to whom the parties must go at intervals for leave to do what, in their sovereign right, they should be able to do . . . ." *Nebraska v. Wyoming*, 325 U.S. at 658 (J. Roberts, dissenting). *See also Vermont v. New York*, 417 U.S. 270, 274-77 (1974). The track on which the government and the Special Master would set this case would call upon the Court to weigh the interstate equities anew each time a new use of water is proposed in any of the three states. The demands on the resources of the parties and the Court would be substantial. But even more importantly, there would be no finality or certainty in the determination of rights between the states, and planning the development of new water supplies would be frustrated. *See Arizona v. California*, 460 U.S. 605 (1983); *Nevada v. United States*, 463 U.S. 110 (1983).

In the original proceeding, the Court determined that Nebraska was not entitled to demand direct flow water from Wyoming for use below Tri-State Dam. *Nebraska v. Wyoming*, 325 U.S. at 628-29, 654-55. In fact, the United States urged the Court to issue an express injunction limiting diversions by the Nebraska canals in order

to give effect to that determination. *Id.* at 628. The Court saw no need for that injunction at the time but confirmed that the apportionment was intended to protect the supply for specific irrigation uses on specific lands served by diversions between Guernsey Dam and Tri-State Dam. *Id.* at 628-29. The requirements of the canals in that section were the very basis of the apportionment; they were fully litigated and were expressly determined by the Court. *Id.* at 627, 637-51.[8]

The United States now cautions that to limit Nebraska to her determined requirements might reduce historical return flows below Tri-State Dam, thereby eliminating "the factual predicate for providing no apportionment below Tri-State." U.S. Brief at 37. Such caution is entirely misplaced. Special Master Doherty's and the Court's conclusion regarding the adequacy of the supply below Tri-State Dam was based on evidence of return flows during the drought period. Doherty Report at 94-95. The average annual drought period diversions above Tri-State Dam that resulted in the return flows below were

8. The Court should not be misled by the false assertion that the determined water requirements were based on reduced, drought period supplies. Neb. Response to Wyoming's . . . Exceptions . . . at 97 n.159. In fact, Special Master Doherty's determination of the Nebraska water requirements was generously based on conditions of full supply. For example, the evidence that Special Master Doherty relied on in fixing the water requirement for the Fort Laramie Canal "was arrived at by investigation and study rather than upon the basis of any historic record" or was based on "years of normal or close to normal water supply." Doherty Report at 200-01. Doherty adopted a figure of 1.66 acre-feet per acre whereas the 1931-1940 average delivery had been only 1.37 acre-feet per acre. *Id.* at 202-03. Likewise, for the Interstate Canal, Special Master Doherty adopted a figure of 1.8 acre-feet per acre, which he described as "liberal" in comparison to the 1.66 acre-feet shown by a United States study based on a 1930-1939 average that excluded the drought years of 1934-1936. *Id.* at 210. *See generally Id.* at 76-79, Tables VII-XIV.

less than the requirements that were determined as the measure of Nebraska's apportionment. Doherty Report at 76-79, Tables VII through XIV. Elaborating on his conclusion regarding the adequacy of drought period return flows below Tri-State Dam, Special Master Doherty cited Wyoming Exhibit No. 180 which showed that return flows would provide a sufficient local supply downstream even if there were no direct flow water passing Tri-State Dam.[9] Doherty Report at 95-96; *Nebraska v. Wyoming*, 325 U.S. 589, 655 (noting that water passing Tri-State Dam was "in addition to the local supplies which even during the drought period were adequate to meet the needs of the canals without calling upon up-river water"). Therefore, if the diversions by the Nebraska canals above Tri-State were limited to the determined requirements and no flow were allowed to pass Tri-State Dam, the resulting return flows still would be greater than the drought period return flows which the Court found adequate.

The United States apparently would concede Nebraska's overreaching assertion that she has a right under the existing Decree to continue inefficient and wasteful practices in order to maintain excess flows for uses that have no claim to an apportionment of flow under the Court's 1945 decision.[10] The United States fails to discern the difference between Nebraska's intrastate autonomy and her limited interstate apportionment. While the Court chose not to restrict the states' intrastate autonomy any more than was necessary to effect the

9. A copy of Wyoming Exhibit No. 180 is reproduced in Appendix C to Wyoming Second Motion for Summary Judgment (Docket No. 294).

10. The United States' involvement in delivering federal project storage water to canals in excess of their beneficial use requirements also violates the Reclamation Act's express beneficial use limitation. 43 U.S.C. § 372 (1990).

apportionment, the Court did limit Nebraska's interstate apportionment to the uses supplied by canals diverting at or above Tri-State Dam. Thus, while a Nebraska canal may be free to divert more than its determined requirements as against another Nebraska canal, it has no such right as against the federal reservoirs under Paragraph IV of the Decree or as against new uses in Wyoming.

III. THE UNITED STATES IS NOT ENTITLED TO SUMMARY JUDGMENT ON THE INLAND LAKES ISSUE.

A. The Summary Judgment Recommended by the Special Master Would Result in Internal Conflicts in the Decree and Would Contravene Federal and State Law.

The government's oversimplified argument with respect to the Inland Lakes fails to apprise the Court of all the facts and fails to recognize the consequences of adopting the Special Master's recommendation.

The Special Master's recommended modification of the Decree would conflict with Paragraph III of the Decree ordering the priority of storage in the federal reservoirs. The new Paragraph XVIII would enjoin Wyoming from interfering with storage in Glendo and Guernsey Reservoirs under a 1904 Inland Lakes priority. Second Interim Report at 110. At the same time, existing Paragraph III would enjoin Wyoming from permitting storage in Glendo Reservoir ahead of any of the other main stem reservoirs or in Guernsey Reservoir ahead of Pathfinder. Thus, Paragraph III and the new Paragraph XVIII would impose conflicting obligations on Wyoming.

The proposed new Paragraph XVIII would also conflict with Paragraph XVII which enjoins storage in Glendo Reservoir except for the allowed annual 40,000 acre-feet of natural flow for irrigation purposes, temporary flood control, dead storage and restorage of Pathfinder Reservoir water.

Such conflicts with the existing Decree negate the argument that the Special Master's recommendation only carries out what was previously determined by the Court. Surely the Court would not have adopted Paragraphs III and XVII as written if it had intended also to confirm a 1904 priority for the Inland Lakes.

Since the United States did not comply with Wyoming law in obtaining a storage priority for the Inland Lakes (Second Interim Report at 30-32), the relief that the Special Master has recommended — modifying the Decree to establish a 1904 priority for storage in the Inland Lakes — can be granted only by disregarding and overriding state law. The Master's recommendation also disregards section 8 of the Reclamation Act requiring compliance with state law and contravenes the longstanding congressional and judicial policy of deference to state law in the allocation of water resources. 43 U.S.C. § 383 (1990); *see California v. United States*, 438 U.S. 645 (1978); *Nebraska v. Wyoming*, 295 U.S. 40, 43 (1935). The simple resolution of the Inland Lakes matter has always been to require the United States to comply with the Reclamation Act and to obtain a state water right for natural flow diversions to the Inland Lakes.[11]

11. The government's inertia against obtaining a state water right in large part stems from an unsubstantiated fear of an adverse impact on the irrigation deliveries through the Interstate Canal. That fear

B. If Storage of Water in the Inland Lakes is a "Vital Underpinning" of the Apportionment, Then the Determined Water Requirements are the Measure of Nebraska's Equitable Apportionment.

Wyoming has demonstrated that the key facts relied upon by the Special Master in recommending a disposition of the Inland Lakes issue are in dispute and require a trial. Wyo. Brief on Exceptions at 59-62. The United States has failed to address those disputed issues of fact but, in effect, asserts without support that the Special Master correctly found certain facts without a trial. U.S. Brief at 16-19.

The only facts relevant to the Inland Lakes that are undisputed are that the Inland Lakes historically stored available natural flow gains below Alcova and that Special Master Doherty reduced the Interstate Canal's irrigation season apportionment by the average amount of such historical, non-irrigation season storage in the Inland Lakes. Wyoming acknowledges that, by urging Special Master Doherty and the Court to reduce Nebraska's irrigation season apportionment by the amount of water that could be stored in the Inland Lakes during the non-irrigation season, Wyoming waived any

is dispelled by the Army Corps of Engineers' conclusion that a present-day priority for the Inland Lakes would not adversely impact the lakes or the North Platte Project. Record of Decision at 12, 16-17 (Docket No. 84a). The operation of the Inland Lakes to store available gains below Alcova has not interfered with any other existing water users in Wyoming. Fourth Affidavit of Gordon W. Fassett, Wyoming Brief in Response to Motions for Summary Judgment of Nebraska and the United States (Docket No. 334). However, such interference would occur if the Court overrides state law and adopts a 1904 Inland Lakes priority as recommended by the Special Master.

argument that such otherwise unpermitted, "free river" diversions to the Inland Lakes is illegal. But to conclude that Wyoming thereby agreed to a specific priority enforceable against Wyoming uses that had never before been affected by the Inland Lakes is a leap that is without support in the record.

The government's argument that it is entitled to summary judgment determining a priority for storage of water in the Inland Lakes without a state water right rests on the proposition that the ability of the Inland Lakes to store 46,000 acre-feet of water each non-irrigation season is a "vital underpinning" of the equitable apportionment. U.S. Brief at 16-19. The government explains, "[t]he Court's apportionment, based on Special Master Doherty's Report, was explicitly premised on the expectation that Nebraska's water requirements during the irrigation season could be reduced by storing 46,000 acre-feet of North Platte water in the Inland Lakes during the non-irrigation season." U.S. Brief at 17. However, in the next breath, the government denies that the water requirements determined for the Interstate Canal and the other canals in the Guernsey Dam to Tri-State Dam section were intended to be the limit of Nebraska's apportionment. U.S. Brief at 38-40. The United States cannot have it both ways.

C. The Reliance of the United States on Principles of *Res Judicata* is Misplaced.

The United States argues that Wyoming should have disputed the claimed 1904 priority for the Inland Lakes in the original proceeding. U.S. Brief at 19. The simple answer is that no party presented a claim for determination of a 1904 priority for the Inland Lakes and, there-

fore, there was nothing for Wyoming to dispute. Even if the pleadings in the original proceeding were broad enough to encompass the issue of an Inland Lakes priority, the record shows that the issue was not litigated and that Wyoming had no burden to litigate it. See Wyoming Supplemental Brief Regarding Summary Judgment at 3-10 (Docket No. 374). In the original proceeding, Wyoming's proposal for a mass allocation did not depend on priorities. Doherty Report at 100-101. Wyoming therefore had no duty to present evidence of specific priorities in her case-in-chief. Nor did Wyoming, as the defendant, have a duty to contravene the government's general allegation of compliance with state law beyond the general denial in Wyoming's answer to the United States' petition of intervention.[12] Wyoming Answer to U.S. Petition of Intervention at 15, ¶ 2; also at 7, ¶ 7, Appendix to Wyoming's Supplemental Brief at A6, A7 (Docket No. 374). A defendant's general denial apprises the plaintiff of those allegations in the complaint that are contested and will require proof for the plaintiff to prevail. 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1261 at 383 (1990). Thus, once Wyoming denied the United States' allegation of compliance with state law, the burden was on the United States to prove compliance

12. In the context of addressing the United States' claim that it owned all of the unappropriated water of the North Platte River by reason of federal land withdrawals for the reclamation projects, the Court noted that the United States had proceeded under state law to obtain water rights for the North Platte Project. *Nebraska v. Wyoming*, 325 U.S. at 613-15. The acknowledgment that the United States had elected to seek water rights under state law rather than to rely on its reservation theory when it began construction of the North Platte Project has nothing to do with a claimed 1904 priority for the Inland Lakes because such a priority was not asserted in the original proceeding.

with state law for the Inland Lakes if it wanted to pursue that issue.[13]

The "burden is on the party asserting preclusion to show actual decision of the specific issues involved . . . . 'To sustain this burden a party must produce a record sufficient to reveal the controlling facts and pinpoint the exact issues litigated in the prior action.' " 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4420 at 185 n.11 (1981 & Supp. 1992) (citing *Hernandez v. City of Los Angeles*, 624 F.2d 935, 937 (9th Cir. 1980)). The United States has failed to meet that burden.

IV. WYOMING IS ENTITLED TO SUMMARY JUDGMENT DENYING NEBRASKA'S CLAIMS THAT THE GRAYROCKS RESERVOIR OR CORN CREEK PROJECT VIOLATE THE APPORTIONMENT.

The United States, like the Special Master, acknowledges that "neither this Court nor Special Master Doherty ever made any precise disposition of the Laramie inflows." U.S. Brief at 27; Second Interim Report at 59. Whether the Court accepts the government's characterization of the Court's 1945 decision as leaving the Laramie River flows unapportioned[14] or accepts

13. The government's failure to present a claim for a specific priority for the Inland Lakes is contrasted with the specificity of its claims for storage priorities based on state law water rights in the other federal reservoirs. Doherty Report at 136-138.

14. Had the Court intended to "defer decision" on Nebraska's requested apportionment because "there was no concrete threat", as the government argues (U.S. Brief at 27), it could have included a provision in Paragraph XIII of the Decree for that purpose. Paragraph XIII(c) applies only to tributaries between Pathfinder and Guernsey Reservoirs, not to the Laramie River.

Wyoming's view that the 1945 decision in effect denied Nebraska's claim to an apportionment of the Laramie River, the result in the present case should be the same. Wyoming is entitled to summary judgment disposing of Nebraska's claims that Wyoming is violating or threatening to violate the existing apportionment by the operation of Grayrocks Reservoir or the proposed construction of the Corn Creek Project.

However, the government is not content to close the Laramie River chapter of this lawsuit at that point. Rather, although it has filed no claims of its own in this case, the government argues that the Special Master may recommend relief beyond the enforcement action that Nebraska has pleaded and argues that the Master may require Wyoming to proceed to trial on a new weighing of the equities with respect to the Laramie River.

The United States offers nothing to support the Special Master's recommendation that the Court retain jurisdiction to enforce Nebraska's rights under the Grayrocks Settlement Agreement. The government's protestation that the recommended new injunction would not be "in aid of enforcement of the settlement agreement" (U.S. Brief at 29) is contradicted by its own characterization of the issue as "whether Wyoming may allow those releases [required of Basin under the settlement agreement] to be appropriated, *thereby depriving Nebraska of the benefit of its settlement.*" U.S. Brief at 28 (emphasis added).

The United States wants an "opportunity . . . to return to Court for relief in the event that a more concrete threat of depletion develops." U.S. Brief at 28. As a party to the Grayrocks Settlement Agreement, the United States is

no more entitled to such an opportunity than is Nebraska. Both the United States and Nebraska agreed to the construction and operation of the Grayrocks Reservoir. Both Nebraska and the United States agreed to the 22,500 acre-feet of additional diversions by the Corn Creek Project from the Laramie River, provided Basin would secure and make available to the North Platte River 11,250 acre-feet of water from other sources in the North Platte basin in accordance with paragraph 5 of the settlement agreement. Finally, as Nebraska and the United States agreed, the federal district court retained jurisdiction to interpret and enforce the settlement agreement. *See* Appendix A-33 to A-36 to Wyoming Brief in Opposition to Motion for Leave to File Petition (Docket No. 2).

V. WYOMING IS ENTITLED TO SUMMARY JUDGMENT THAT DEER CREEK RESERVOIR WILL NOT VIOLATE NEBRASKA'S APPORTIONMENT UNDER THE DECREE.

The United States argues that there are facts in the record showing that Deer Creek Reservoir will have impacts either on the amount of carryover storage held in the federal reservoirs or on the amount of excess natural flow passing Tri-State Dam. U.S. Brief at 32-34. Even if those facts are accepted as true, they would not establish a clear and convincing case of substantial injury to Nebraska's natural flow apportionment for the canals diverting in the Guernsey Dam to Tri-State Dam section. Since Nebraska could not prevail at trial on the facts she has proffered, summary judgment should be granted for Wyoming. *Celotex Corporation v. Catrett,* 477 U.S. 317 (1986). *See* Wyoming Brief in Support of Second Motion for Summary Judgment at 87-101 (Docket No. 294); Wyoming Reply Brief in Support of Second Motion for Summary Judgment at 55-61 (Docket No. 352).

The United States argues that a showing of an impact on storage levels in the federal reservoirs would itself be enough to avoid summary judgment on the Deer Creek Reservoir issue. U.S. Brief at 32-33. However, the United States, through the Army Corps of Engineers, also has concluded that any reduction in storage levels in the federal reservoirs as a result of Deer Creek Reservoir would not significantly affect the supply of irrigation water to the canals dependent on those reservoirs. Record of Decision at 11-12, 16-17, Supplemental Information Document at 16, 23 (Docket No. 84a).

Moreover, the United States has no separate apportionment under the Decree. *See Nebraska v. Wyoming,* 325 U.S. at 629. Nor has the United States brought any claims for relief in this case. The allegation of the United States that Deer Creek Reservoir might not respect the priorities of the federal reservoirs is unfounded in light of the unequivocal statements by Wyoming's State Engineer that Deer Creek Reservoir will be administered according to Wyoming law, including regulation in priority for the senior storage rights of Guernsey and Glendo Reservoirs. First Affidavit of Gordon W. Fassett, Wyoming [First] Motion for Summary Judgment at 8 (Docket No. 23); Deposition of Gordon W. Fassett, Volume I at 116-17, 126-27, 137-38 (Docket No. 310). Nevertheless, as a Wyoming appropriator, the United States has remedies under state law and need not look to the Supreme Court for redress of every speculative concern about how Deer Creek Reservoir may be operated or administered in the future.[15]

15. The United States has availed itself of Wyoming law and water administration in recent years by placing a "call" for regulation of junior water rights for the senior storage priorities of Pathfinder and Guernsey Reservoirs. The Wyoming State Engineer responded by regulating junior Wyoming water rights. Fourth Affidavit of Gordon W. Fassett, Wyoming Brief in Response (Docket No. 334).

The refusal of the United States to focus on the real issue — the potential injury to Nebraska's Guernsey Dam to Tri-State Dam apportionment — is rooted in the inability to show any real harm. There is no dispute that Nebraska's canals in the Guernsey Dam to Tri-State Dam section have increasingly diverted more than the determined requirements and that return flows below Tri-State Dam have increased correspondingly since 1945.[16] Against that backdrop of increased diversions and increased return flows, the United States joins Nebraska's attack on the 9600 acre-feet average annual yields of Deer Creek. With those facts, it is little wonder that no harm can be shown to Nebraska's existing apportionment that would justify additional restrictions on Wyoming's modest proposal to increase depletions for municipal use.

CONCLUSION

The Court should sustain Wyoming's exceptions to the Special Master's Report and grant summary judgment for Wyoming.

16. Nebraska protests that the average annual amount of such excess diversions since entry of the Decree is less than 5% of the determined requirements. Neb. Response at 27. Yet Nebraska has admitted that the "average post-Decree diversions" for those canals has exceeded the determined requirements by 41,000 acre-feet — more than four times the average annual yield of the proposed Deer Creek Reservoir. Neb. Response at 23, 27. In addition to admitting excess diversions, Nebraska admits that post-Decree return flows below Tri-State have averaged 736,000 acre-feet annually of which 393,600 acre-feet returned during the irrigation season. Neb. Response at 28. The comparable average drought season return flows relied upon by Special Master Doherty were 592,800 acre-feet per year of which 249,100 acre-feet returned during the irrigation season. Wyoming Exhibit No. 178, Doherty Report at 94-95. That amounts to increased irrigation season return flows of 144,500 acre-feet over those considered adequate by Special Master Doherty.

Respectfully submitted,

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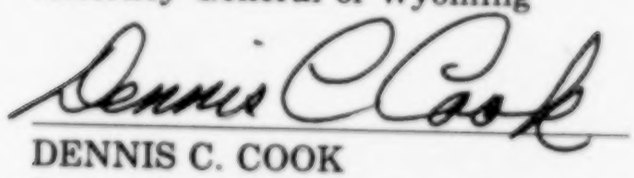

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